No. 79-6423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER, *Petitioner,*

v.

DEPARTMENT OF SOCIAL SERVICES
OF DURHAM COUNTY, NORTH CAROLINA,
Respondent.

**On Writ Of Certiorari To The
North Carolina Court Of Appeals**

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. The Writ of Certiorari Should Not Be Dismissed as Improvidently Granted.

In his brief[1] respondent notes that petitioner did not ask the trial court to appoint an attorney on her behalf and, on this single factual predicate, belatedly asserts[2] that certiorari was improvidently granted. Although the precise contours of respondent's contention are unclear, he appears to be making two separate arguments. First, he seems to suggest that by failing to ask the trial court to appoint counsel on her behalf, petitioner has effectively waived that right. Second, he asserts that in the absence of an outright request to appoint counsel at

[1] Brief for Respondent, pp. 7-10.

[2] Respondent never raised this issue either in his answer to the Petition for Discretionary Review to the North Carolina Supreme Court (J.A. 26-7) or in his Brief in Opposition to Petitioner's Petition for a Writ of Certiorari in this Court. Nor has he at any time filed a motion in this Court to dismiss certiorari as improvidently granted.

the trial level, petitioner's constitutional entitlement to court-appointed counsel is not properly before this Court. Petitioner will discuss each of these assertions *seriatim* and demonstrate that each is without merit.

This Court has frequently stated that it will, ". . . not presume acquiesence in the loss of fundamental rights." *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U.S. 292, 307 (1937). In the civil, as well as in the criminal area, this Court has repeatedly indicated that courts must indulge every reasonable presumption against waivers of fundamental rights. *Fuentes v. Shevin,* 407 U.S. 67, n. 31, 94 (1972); *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 393 (1937). As this Court stated in *Brady v. United States,* 397 U.S. 742 (1970),

> Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Id. at 748.

Applying these principles in the context of an accused's right to counsel, this Court has consistently refused to presume waiver of the right to counsel based upon a defendant's failure to request appointment of counsel. Over forty years ago this Court stated:

> The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.

Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

Carnley v. Cochran, 369 U.S. 506 (1962), is analogous to the case at bench in that petitioner therein never requested appointment of counsel, nor did the trial court offer to appoint counsel on his behalf. In *Carnley* this Court rejected the argu-

ment that petitioner had implicitly waived his right to counsel in language which applies equally to the case at bench.

> But it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.
>
> * * * *
>
> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not wavier.

Id. at 513, 516.

Similarly, in *Kitchens v. Smith,* 401 U.S. 847 (1971), although petitioner had not testified at the habeas corpus hearing that he had wanted a lawyer, had asked for one, or had made any effort to find one, this Court relied on *Carnley v. Cochran, supra,* in holding that petitioner had not waived his right to counsel.

The basic principle which emerges from the above-cited authority is that a defendant's failure to ask the court to appoint counsel to represent him is not an effective waiver of his right to counsel in the absence of a clear showing that counsel was offered to him, and that he intelligently and understandably rejected the offer. By parity of reasoning, unless a parent who is the subject of a termination of parental rights proceeding is offered the assistance of counsel and voluntarily, intelligently, and competently waives her right to an attorney, counsel must be appointed to represent her if she is indigent.[3] *See also In re Gault,* 387 U.S. 1, 41-2 (1967); *McNeal v. Culver,* 365 U.S. 109

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[3] The right of indigent parents to court-appointed counsel in a termination case necessarily entails the right to court-appointed counsel at all "critical" stages of the proceeding. *Accord, Coleman v. Alabama,* 399 U.S. 1 (1970). This would include all pre-adjudication and dispositional hearings. *See* IJA-ABA Juvenile Justice Standards Project, *Standards Relating to Counsel for Private Parties,* Commentary to Standard 2.3(b) (1980). In order to avoid

n.1, 111 (1961); *Uveges v. Pennsylvania,* 335 U.S. 437, 441 (1948).

The record in the present case indicates that at no point prior to the termination hearing did the judge, or anyone else, advise petitioner of her right to counsel or offer to appoint counsel on her behalf.[4] Without being advised of her absolute right to be represented by counsel, petitioner's ignorance of possible sources of legal representation cannot be translated into an intentional relinquishment of a known right. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

Respondent's assertion that petitioner did not properly raise her entitlement to counsel below must also be rejected as specious. In complying with Rule 10 of the North Carolina Rules of Appellate Procedure, petitioner filed as an assignment of error in the district court the court's failure to appoint counsel to represent her as required under the Fourteenth Amendment to the United States Constitution. (J.A. 15) Petitioner briefed this issue in the North Carolina Court of Appeals. The Court of Appeals reached the merits of the case and specifically found that it is not compelled, ". . . to hold that appointment of counsel for indigent parents is constitutionally

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uninformed or unknowing waivers of the right to counsel, and to provide counsel with adequate time to prepare his case, petitioner urges this Court to adopt the holdings of the District Court and the Court of Appeals in *Davis v. Page,* 442 F.Supp. 258 (S.D. Fla. 1977), *affd.* 618 F.2d 374 (5th Cir. 1980), *rehear. en banc granted,* that parents be advised of their right to counsel, if indigent, immediately upon filing of the petition, and that no waiver of the right to counsel will be effective unless the trial judge has determined, on the record, that such waiver is knowing and intelligent. 442 F.Supp. at 265; 618 F.2d at 386.

[4] After the court sustained the petition, and petitioner indicated that she wished to appeal, the court advised her that if she could not afford an attorney, she might seek an attorney from the North Central Legal Assistance Program. (RT 62) However, the court never advised her of the possibility of obtaining counsel from the North Central Legal Assistance Program, or from any other legal services office, prior to the termination of parental rights hearing.

mandated." (J.A. 23) Likewise, both petitioner's Notice of Appeal and Petition to the Supreme Court of North Carolina for Discretionary Review were based on the trial court's alleged constitutional error in failing to appoint counsel to represent petitioner. (J.A. 24-5)

Under these circumstances, it is difficult to comprehend the basis for respondent's contention that the constitutional issue of petitioner's right to counsel was not properly preserved. When a state appellate court assumes or holds that a federal question was properly raised, and proceeds to consider it on the merits, this Court will presume that the issue is properly before it. *Coleman v. Alabama,* 377 U.S. 129, 133 (1967); *Whitney v. California,* 274 U.S. 357, 360-61 (1927). In fact, even when an appellant has failed to argue a constitutional issue below, this Court will rule upon the issue as long as the state supreme court has reached and decided it. *Jenkins v. Georgia,* 418 U.S. 153 (1974); *see Raley v. Ohio,* 360 U.S. 423, 436 (1959).

In the case at bench the North Carolina Court of Appeals held that petitioner did not possess a constitutionally guaranteed right to counsel in a termination of parental rights proceeding. Since the constitutional issue was properly raised in the papers before the North Carolina Supreme Court, it must be presumed that the North Carolina Supreme Court reached the merits of petitioner's constitutional claim in dismissing her appeal. *See Falls Sales Co. v. Board of Transportation,* 292 N.C. 437, 233 S.E.2d 569 (1977). Since the constitutional question was raised in both state appellate courts, and is the subject of one state court appellate opinion which reached the merits of petitioner's contention, the issue is properly before this Court.

II. Appendix C To Respondent's Brief Strongly Supports Petitioner's Contention That Without Representation by Counsel the Risk of Erroneous or Inappropriate Terminations of Parental Rights is Considerably Enhanced.

Respondent has annexed to his brief as Appendix C the

questions and a compilation of the answers from a survey which he claims was mailed to each of the one hundred counties in North Carolina during November of 1980. Although the practice of bolstering one's case by surveys conducted after the granting of certiorari seems, at the least, highly questionable,[5] petitioner does not object to use of the questionnaire results in this case because they clearly support the reasons presented in Petitioner's Brief why appointment of counsel for indigent parents is essential to vouchsafe due process.

The survey results indicate that out of 768 termination cases over approximately a three year period, parents were represented by counsel in 120 cases (15.6%). The actual questionnaire responses, which are only summarized in Appendix C,[6] demonstrate that in some counties counsel is actually appointed by the court, whereas in other counties parents are able to secure assistance from the local legal services or legal aid programs. The questionnaire results, therefore, confirm the capriciousness of North Carolina's present policy concerning appointment of counsel in termination cases. In the majority of counties counsel is simply not available to represent indigent parents. A parent's ability to gain representation will turn upon the wholly fortuitous circumstance of whether she resides in one of the few counties where a judge is willing to appoint counsel to represent her, or whether the local legal services program is willing and able to represent her and she is made aware of this source of possible representation.[7] A

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[5] The questionnaire results are obviously not part of the record on appeal; nor has respondent urged that this Court could properly take judicial notice of the results of such a questionnaire.

[6] Respondent mailed the individual responses to counsel for petitioner and *amici* on December 9, 1980. Brief for Respondent, Appendix C at 27a.

[7] There are an insufficient number of legal services attorneys to meet all of the legal needs of their clients. G. Bellow, *Legal Aid in the United States*, 14 Clearinghouse Rev. 337 (July 1980). *See* Brief for *Amicus Curiae*, National Legal Aid and Defender Association, 23-4. As a result, most legal

parent's ability to safeguard her fundamental right to family integrity should not depend upon the fortuity of local practice and availability of counsel.

Respondent notes that only seven of 127 cases (5.5%) where parents were represented by counsel resulted in dismissal of petitions. From these figures he infers that it is unlikely that many of the 640 petitions sustained where parents were unrepresented by counsel would have been dismissed if attorneys had been provided to these parents.[8]

One problem with respondent's conclusion is that it is based upon insufficient statistical information. As respondent concedes in his brief,[9] many counties reported that most of their termination proceedings were uncontested — being brought against absent fathers or parents who failed to respond. Unless we can be certain — which is not indicated in the questionnaire results — that counsel is never appointed for a parent in an uncontested case, it is impossible to determine the percentage of contested cases where parents, represented by counsel, were able to prevail.[10]

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services programs have adopted methods for reduction of intake by—for example—refusing to handle certain types of cases (*e.g.* family law matters), or by limiting the number of cases they will handle, or the hours or days of the week during which they will interview new clients. *See, e.g.* Arango, *Planning for Legal Services Projects: Concepts, Experiences, and Issues,* 12 Clearinghouse Rev. 163 (July 1978); E. Metzner, *Too Many Clients, Too Little Time* (N.L.A.D.A. 1974).

[8] Respondent's Brief, pp. 38-9.

[9] *Id.* at 39.

[10] Moreover, respondent assumes that all cases where termination petitions were sustained are correctly decided. Since North Carolina law does not guarantee the right of an indigent parent to be represented by counsel on appeal, nor even the right to be notified of her right to appeal an adverse ruling [see N.C. Gen. Stat. §7A-289.34 (Cum. Supp. 1979)], it is reasonable to assume that many errors at the trial level remain undetected. Cf. *Douglas v. California,* 372 U.S. 353 (1963). With provision of counsel, one would anticipate an increase in the number of appeals, and a concomitant improvement in the quality of procedural regularity at the trial level.

Accepting *arguendo* the accuracy and utility of the figures in Appendix C to Respondent's Brief, these statistics, in any event, confirm the necessity for appointing counsel for indigent parents. In seven out of the eight cases where petitions were not sustained (87.5%), parents were represented by counsel. In only 120 of the 760 cases where petitions were sustained (15.8%) were parents represented by counsel. More significantly, perhaps, while petitions were dismissed in 5.5% of the cases where parents were represented by counsel (7 of 127), petitions were dismissed in only 0.15% of the cases where parents were unrepresented by counsel (1 out of 641). Statistically, a parent had a thirty-six times greater chance of prevailing in a termination proceeding if she was represented by counsel than if she was unrepresented.[11] The statistical discrepancy in the results where parents are, and are not, represented by counsel confirms the crucial role which attorneys can, and do, play in North Carolina in preventing unfounded and inappropriate terminations of parental rights.

III. Termination of Parental Rights Proceedings Do Directly Implicate Fundamental Rights Worthy of the Highest Degree of Constitutional Protection.

Respondent acknowledges that a parent's fundamental right to the care and custody of her children is directly implicated in an abuse, neglect, or dependency proceeding. How-

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[11] It is also interesting to note that only five of the seventy-three counties responding to respondent's survey reported that termination proceedings are *ever* brought to court by a social services agency which is unrepresented by counsel. It is possible that counsel was not sought by the social services agencies in those five counties primarily in uncontested cases, although this is not entirely clear from the survey answers. In any event, the prevailing practice throughout almost all counties in North Carolina is for the county department of social services to be represented by counsel in termination cases—thereby exacerbating the gross inherent imbalance of expertise between the governmental litigant and the unrepresented parents. *See, In re Ella B.*, 30 N.Y.2d 352, 285 N.E.2d 288, 290 (1972); *In re Welfare of Luscier*, 84 Wash.2d 135, 524 P.2d 906, 908 (1974); *In re Adoption of R.I.*, 312 A.2d 601, 602-03 (S.Ct. of Pa. 1973).

ever, respondent asserts that once a juvenile court has removed custody of a child from a parent in an abuse or neglect case, the parent's interest in her child becomes qualified, conditional, and less worthy of full due process protection. [12]

Respondent's argument misconceives crucial differences between neglect and abuse cases and proceedings to terminate parental rights. Under North Carolina law the primary goals of abuse and neglect proceedings are to protect the child while preserving the child's ties to his parents to the maximum, feasible extent. N.C. Gen. Stat. §§ 7A-516, 7A-544, 7A-586, 7A-647, 7A-657. As discussed in the Brief of *Amicus Curiae,* the State of North Carolina, [13] many abuse or neglect proceedings result in the child being left in his parents' home under the supervision of the department of social services. If custody is removed, the social services department must work towards restoration of the child with his parents. Only if family reunification should prove unfeasible will termination of parental rights be attempted. *Id.* at 13-16. [14]

Thus, it is misleading to equate the parents' custodial rights at stake in a dependency or neglect proceeding with parental rights which are at peril in a proceeding to terminate parental rights. If an abuse or neglect petition is sustained, it may — or may not — lead to a temporary removal of the child from his parents' custody. However, even when custody is removed, the juvenile court is mandated to conduct a review hearing within six months of the initial dispositional order to find out

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[12] Brief for Respondent, p. 33.

[13] *Id.*, pp. 13-17.

[14] "When the relationships essential to the child's well-being and self-worth are threatened or destroyed, first and continuing efforts should be directed toward increasing or restoring family unity. . . . In order to permit a child's early return to his family, it is necessary to try to increase the strengths of his family. Permanent separation of a child from his family should be determined as quickly and soundly as possible." 1 Family Services Manual, c. IV, 1200 (Rev. 75), cited in Brief for the State of North Carolina, *Amicus Curiae,* n. 43 at 16.

what services have been offered to reunite the family and whether family reunification is possible. N.C. Gen. Stat. §7A-657.

The purpose of a termination of parental rights proceeding is to sever entirely the parent-child relationship. An order terminating parental rights, ". . . completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent" except for the child's right of inheritance which is terminated at such time as the child is adopted. N.C. Gen. Stat. §7A-289.33. While abuse or neglect proceedings involve infringements upon parents' custodial rights, in termination of parental rights cases, "the parent loses not only physical custody but also the right to ever regain custody." Wald, *State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,* 28 Stan. L. Rev. 623, 633 (April 1976). In addition, termination extinguishes other aspects of the parent-child relationship which may be of significant concern to both parent and child. These include the parent's duty to support the child, the right of both parents and child to visit each other, the parent's right to authorize medical care and to withhold consent to adoption, and — at least in some jurisdictions — the child's right to inherit intestate from his parents. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* XXXIX Law and Contemporary Problems 226, 245 (Summer 1975).[15]

In *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), this Court recognized that a parent's liberty interest in family integrity derives from three sources: blood relation-

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[15] Other significant rights may also be affected by an order terminating parental rights. In the case at bench, for example, the termination order effectively abolishes the child's right to maintain a relationship with his grandmother and siblings. In neglect and abuse cases, visitation by parents, siblings, and grandparents is usually permitted unless contrary to the best interests of the child.

ship, state-law sanction, and intrinsic human rights. *Id.* at 845-46. Whatever the source of the constitutionally protected interest may be, it is evident that an order terminating parental rights — unlike a neglect adjudication — obliterates the legal basis for the very existence of the parent-child relationship.[16] Hence, respondent is simply wrong in suggesting that parental rights implicated in termination proceedings are qualified or conditional. Since the continued existence of the parent-child relationship is at stake, the highest degree of constitutional protection is compelled. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972).

IV. The Right of an Indigent Parent to Court-Appointed Counsel in a Termination of Parental Rights Case Must Be Given Retroactive Effect, At Least When There Has Not Been a Completed Adoption.

Amicus Curiae, the State of North Carolina, argues that if the Court holds that indigent parents in termination of parental rights cases do enjoy a constitutional right to court-appointed counsel, the Court's decision should be given prospective application only.[17] This Court has generally preferred not to consider the retroactivity of its decisions overruling prior precedent, or creating newly fashioned rules of procedure, until confronted by cases which squarely raise the retrospective application of the new rule or decision. *Compare Mapp v. Ohio*, 367 U.S. 643 (1961), *with Linkletter v. Walker*, 381 U.S. 618 (1965); *Duncan v. Louisiana*, 391 U.S. 145 (1968), *with Destefano v. Woods*, 392 U.S. 631 (1968). Nevertheless, should this Court decide to reach the retroactivity

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[16] It should also be recognized that under North Carolina law physical abuse or neglect can be a basis for terminating parental rights, and there is no statutory requirement of a prior adjudication in a neglect or abuse proceeding. N.C. Gen. Stat. §7A-289.31(2). It is difficult to understand the rationale of respondent's position that a parent should be entitled to representation in an abuse proceeding but not in a termination of parental rights case based upon allegations of abuse.

[17] Brief of *Amicus Curiae*, pp. 23-5.

issue in this case, this Court's case law strongly supports retroactive application of a decision to require court-appointed counsel for indigent parents in termination of parental rights proceedings.

In arguing in favor of prospective application of any decision requiring provision of counsel, *Amicus* assumes that the criteria articulated in *Linkletter v. Walker*, 381 U.S. 618 (1965), and frequently reiterated by this Court in subsequent decisions,[18] provide the applicable guidelines. *Amicus* analyzes the present case in light of these threefold criteria and concludes that a right to appointed counsel for indigent parents should be limited to cases brought *in futuro*.

The problem with *Amicus*' analysis is that it fails to recognize that this Court has applied a different standard in determining the retroactivity of new constitutional rulings which go to the integrity of the fact-finding process. Where a new constitutional rule is primarily concerned with improving the fairness of the adjudicatory process, this Court has consistently given such rulings retroactive effect.[19] These decisions recognize that the *Linkletter-Stovall* criteria are simply inapplicable

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[18] In *Stoval v. Denno*, 388 U.S. 293 (1967), this Court summarized the *Linkletter* criteria for determining the retroactivity of new constitutional standards as, "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.* at 297.

[19] *See, e.g. Brown v. Louisiana*, 100 S.Ct. 2214 (1980) [*Burch v. Louisiana*, 441 U.S. 130 (1979), holding unconstitutional the Louisiana practice of sanctioning convictions for non-petty offenses by a non-unanimous jury of six, applied retroactively]; *Hankerson v. North Carolina*, 432 U.S. 233 (1977) [*Mullaney v. Wilbur*, 421 U.S. 684 (1975), requiring the state to establish all elements of a criminal offense beyond a reasonable doubt applied retroactively]; *Ivan V. v. City of New York*, 407 U.S. 203 (1972) [*In re Winship*, 397 U.S. 258 (1972), requiring standard of proof beyond a reasonable doubt in juvenile delinquency trial, held retroactive]; *Roberts v. Russell*, 392 U.S. 293 (1968) [giving retroactive effect to *Bruton v. United States*, 391 U.S. 123 (1968)]; *Jackson v. Denno*, 378 U.S. 368 (1964).

when the decision in question impacts upon the fundamental fairness of the trial. *See, e.g., Brown v. Louisiana, supra*, at 2223; *United States v. United States Coin and Currency*, 401 U.S. 715, 723 (1971); *McConnell v. Rhay*, 393 U.S. 2, 3-4 (1968). As this Court stated in *Williams v. U.S.*, 401 U.S. 646 (1971):

> Where the major purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. [Citations omitted.] Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

Id. at 653.

Perhaps no other constitutional guarantee has been so widely recognized as crucial to the accurate development of the facts at trial as the right to counsel. Without representation by counsel, the likelihood of error—either through the failure to exclude inadmissible or prejudicial evidence, to elicit bias or inaccuracies on cross-examination, or as a result of the accused's inability to marshall and introduce evidence supportive of his defense—is unacceptably high.[20] For these reasons this Court has repeatedly ruled that constitutional decisions extending the right to counsel to previously unrecognized stages of the criminal process must be accorded retroactive effect.[21]

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[20] These arguments were developed more extensively in Petitioner's Brief, pp. 27-36.

[21] *Berry v. Cincinnati*, 414 U.S. 29 (1973) [*Argersingr v. Hamlin*, 407 U.S. 25 (1972), extending the right to counsel to misdemeanor offenses for which the accused may be imprisoned, applied retroactively]; *Kitchens v. Smith*, 401 U.S. 847 (1971) [recognizing that *Gideon v. Wainwright*, 372 U.S. 335 (1963), is retroactive]; *Arsenault v. Commonwealth of Massachusetts*, 393 U.S. 5 (1968) [*White v. Maryland*, 373 U.S. 59 (1963), holding that

Since criminal law decisions extending the right to counsel to arraignments, preliminary hearings, or sentencing are applied retroactively, *a fortiori* the right to counsel at the adjudicatory or trial stage of a termination of parental rights proceeding must be given retroactive effect.[22] For the reasons discussed in Petitioner's Brief, representation by counsel is as critical to the full and unfettered development of the facts at a termination of parental rights hearing as at a criminal trial. Under the previously cited precedent holding retroactive the right to counsel and other due process protections which safeguard the fact-finding process, a parent's right to counsel in a termination of parental rights proceeding must similarly be accorded retrospective effect.

However, *Amicus* also argues that a parent's right to counsel should not be given retroactive application because the impact of such a ruling would be to upset numerous finalized adoptions.[23] Petitioner must acknowledge that where there has been a completed adoption, a significant competing interest exists which would impact upon a decision in favor of, or against, retroactivity: namely, the interest of the child and the adoptive parents in maintaining the autonomy of the adoptive family. However, since respondent has advised the Court that no adoption has been undertaken in the case at bench,[24] it is clearly unnecessary for the Court to reach the issue of the

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there is a right to counsel when an accused pleads guilty at a preliminary hearing, must be applied retroactively]; *McConnell v. Rhay*, 393 U.S. 2 (1968) [court's decision in *Mempa v. Rhay*, 389 U.S. 128 (1967)—that there is a right to counsel at a deferred sentence proceeding—given retroactive effect]; *White v. Maryland*, 373 U.S. 59 (1963) [right to counsel at arraignment hearing established in *Hamilton v. Alabama*, 368 U.S. 52 (1961), applied retroactively].

[22] In *Linkletter v. Walker*, 381 U.S. 618 (1965), this Court noted that no distinction has been drawn in retroactivity litigation between civil and criminal cases. *Id.* at 627.

[23] Brief for *Amicus Curiae*, The State of North Carolina, p. 25.

[24] Brief for Respondent, n. 22, p. 36.

retroactivity of a parent's right to counsel in those cases where there has been a finalized adoption.[25]

In *Armstrong v. Manzo*, 380 U.S. 54 (1965), this Court vacated an adoption decree because there was a due process violation in failing to give notice of the adoption proceeding to the child's father. State courts have generally been reluctant to vacate adoptions in the absence of fraud, undue influence, lack of consent or notice. *See generally* 2 C.J.S. *Adoptions* §§113-18 (1972). Where there has been a due process violation, such as denial of the right to notice of the adoption proceeding, some state courts have vacated finalized adoptions. *See, e.g., Blankenship v. Blankenship*, 267 S.E.2d 751 (W.Va. 1980); *Matter of Anderson*, 589 P.2d 957 (Idaho 1979); *Schrum v. Bolding*, 539 S.W.2d 415 (Ark. 1976).

Petitioner believes that it would be singularly inappropriate, in the context of the present case, for this Court to decide the retroactive effect on completed adoptions of any decision in favor of parents' right to counsel in termination of parental rights proceedings. No statistical information has been adduced by *Amicus* as to the number of adoptions which would be affected by a ruling in favor of retroactivity. As previously noted, this issue is not presented in the case at bench since petitioner's son has not been adopted. Moreover, in this sensitive area it may be best to proceed with caution and avoid an absolute rule. There are a multitude of factors which can militate more or less strongly in favor of insulating the adoption from attack.[26] It may be that in determining whether to

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[25] Of Course, a decision to give retroactive effect to the parent's constitutional right to counsel does not necessarily mean that children affected by the Court's decision will be removed from their foster parents. The parents will simply be entitled to new termination of parental rights hearings at which they will have the right to be represented by counsel.

[26] For example, courts are much more likely to permit parents to revoke consent to adoptions within a few weeks or months of giving consent than where the adoption has been finalized for years. *See, e.g., Matter of Anderson*, 99 Idaho 805, 589 P.2d 957 (1979); *Small v. Andrews*, 20 Or. App. 6, 530 P.2d 540 (1975).

vacate completed adoptions because the parents were unrepresented by counsel in prior termination of parental rights proceedings, state courts will have to consider the impact of upsetting such adoptions on a case-by-case basis.

Where—as here—there has been no finalized adoption, the governing principle is well-established in this Court's jurisprudence. If this Court reaches the issue, maintenance of the integrity of the fact-finding process compels retroactive application of a decision in favor of affording indigent parents the right to counsel in proceedings to terminate their parental rights.

CONCLUSION

For the above-stated reasons, and the reasons contained in Petitioner's Brief, the judgment and order of the North Carolina Court of Appeals must be reversed and remanded with directions to grant petitioner a new hearing at which she shall be furnished court-appointed counsel.

Respectfully submitted,
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